Supreme Court, U.S.
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IN THE

Supreme Court of the United States

EATON CORPORATION,

Petitioner

v.

CITY OF DETROIT,

Respondent

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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35 pp

QUESTION PRESENTED

On the second day of this environmental trial, Eaton Corporation and the City of Detroit engaged in a settlement discussion, which took place on the record and in which the District Court participated. The District Court later found that the parties did not enter into a settlement agreement during this discussion, and the case proceeded to trial. The Sixth Circuit Court of Appeals reversed, finding that the parties did enter into a binding settlement agreement. This holding raises the following question that warrants review by this Court:

Whether the Sixth Circuit Court of Appeals improperly substituted its own interpretation of the facts for the trial court's, instead of applying the "clearly erroneous" standard of review of Fed. R. Civ. P. 52(a) as construed in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985).

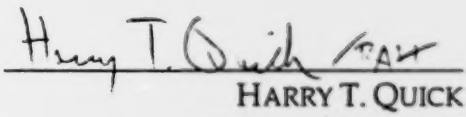
PARTIES TO THE PROCEEDING

The following individuals and entities are parties to the proceeding in the court below:

The City of Detroit, Michigan; George Simon; Joseph Simon; Norina Simon; Shirley Simon; Maurice Taylor; Madeline Taylor; U.S. Group, Inc., a Michigan corporation; U.S. Equipment Company, a Michigan corporation; and Eaton Corporation, an Ohio corporation.

Eaton Corporation makes the following disclosure statement pursuant to Sup. Ct. R. 29.6:

Eaton Corporation is publicly held and has no parent corporation. No publicly held company owns 10% or more of Eaton Corporation's stock.



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PETITION FOR A WRIT OF CERTIORARI

Petitioner Eaton Corporation respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Court of Appeals' opinion is reported at 247 F.3d 619 and is reprinted in the appendix hereto at pages A1 through A22. The Court of Appeals' Order denying Eaton's petition for rehearing is reprinted in the appendix hereto at page B1. The District Court's opinions and orders are not reported.

JURISDICTION

The Court of Appeals entered its judgment on April 16, 2001. Eaton filed a timely petition for rehearing on May 17, 2001, which was denied on June 11, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The jurisdiction of the District Court was founded on 28 U.S.C. § 1331.

STATUTES INVOLVED

- Federal Rule of Civil Procedure 52(a)
- 42 U.S.C. § 9613
- Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-150
- Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499

STATEMENT OF THE CASE

The City of Detroit condemned and acquired certain property in 1989. Eaton Corporation had used the property for manufacturing operations from 1926 to 1973. The City sued Eaton and others to recover past and future environmental cleanup and investigation costs.

Trial commenced on March 6, 1995. Moments before trial was going to reconvene the following day, the City's counsel approached Eaton's counsel with a proposal to settle for $1.2 million. An on-the-record discussion among the City's counsel, Eaton's counsel, and the District Judge followed.

As in any complex case, several issues besides money stood in the way of settlement. The thorniest was contribution protection: Would the City agree to protect Eaton from future claims by third parties? The parties and the District Court discussed this issue at length. Eaton argued below, and the Court of Appeals agreed, that some of these discussions were so convoluted as to be "uninterpretable." (App. at A10.) The District Court proposed that the City and Eaton each submit a proposed draft settlement agreement so that he could pick one version in a process he called "baseball arbitration."

On April 28, 1995, Eaton submitted to the City and the District Court a proposed settlement agreement that reflected Eaton's understanding of the March 7, 1995 discussions. The City balked at Eaton's proposed settlement, and on July 24, 1995, Eaton moved to re-set the matter for trial. On July 27, 1995, the City filed a Motion for Entry of Settlement Judgment.

The District Court held a hearing on August 8, 1995, regarding the issue of settlement. After extensive testimony and argument from both sides, the District Court determined that the parties had not entered into an enforceable settlement

agreement on March 7, 1995. In making this determination, the District Court carefully considered all available evidence and determined that: (1) the parties had never reached agreement regarding material settlement terms, and (2) the District Court was unable to ascertain the terms of the purported settlement agreement. (R. 260, 08/05/95 hearing transcript.)

The District Court re-set the case for trial. The City filed a motion to certify an interlocutory appeal, which the District Court denied, holding, "Clearly the parties contemplated a definitive agreement before their litigation was to be concluded. Absent a definitive agreement, there was no settlement." (R. 180, Order Denying Plaintiff's Emergency Motion for Certification for Interlocutory Appeal.) The case was tried to the Court during August and September 1995.

After trial the City appealed the District Court's finding that no settlement occurred on March 7, 1995. The Sixth Circuit's opinion includes a partial reconstruction of the March 7, 1995 settlement conference transcript. In the Sixth Circuit's synopsis, the discussions of contribution went like this: the City's counsel raised the issue of contribution protection; the District Court interrupted; counsel for Eaton asked for the point to be repeated; the City's counsel responded with a statement that the Sixth Circuit concedes was "uninterpretable;" the District Court attempted to clarify; the City's counsel tried to "get back to the point he was about to make when interrupted by the court;" and Eaton's counsel said, "That's correct." (App. A8-A10.) On this convoluted partial record the Sixth Circuit found that the District Court clearly erred in finding no meeting of the minds took place on the issue of contribution protection.

REASONS FOR GRANTING THE PETITION

I. This Court should grant certiorari to clarify the respective roles of the District Court and the Courts of Appeals in deciding issues of fact.

Although "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law," Sup. Ct. R. 10, review in this instance is appropriate to clarify the respective roles of District Courts and the Courts of Appeals in resolving issues of fact. This Court has not hesitated to intervene where, as here, a Court of Appeals has substituted its own interpretation of facts for the District Court's.

The instant case is similar to *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), in which this Court granted certiorari to review the Fourth Circuit Court of Appeals' application of the "clearly erroneous" standard of review. In *Anderson*, this Court instructed that:

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.

470 U.S. at 573-574.

In the instant case, the Court of Appeals' decision did not discuss in any detail or cite any authority concerning the

standard of review being applied. Eaton believes, based on the opinion's descriptions of the District Court's findings as "clearly erroneous," (App. at A4 and A19) that the Court of Appeals was purporting to apply the "clearly erroneous" standard of Fed. R. Civ. P. 52(a) as construed in *Anderson*. This is the correct standard.[1] However, the Court of Appeals' decision simply cannot be squared with that standard, since there was ample evidence to support the District Court's carefully considered findings on the issue of settlement.

The person who was in the best possible position to determine whether a meeting of the minds occurred was the District Judge, who participated directly in the March 7, 1995 talks and who conducted a separate evidentiary hearing about those talks in the context of the case as a whole. The interaction between counsel, what counsel said, how it was said, and to whom it was directed "calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate printed transcript can impart." *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216 (1947).

In reviewing the transcript of the March 7, 1995 settlement discussions, the Court of Appeals did not consider the record in its entirety, but rather keyed in on certain out-of-context phrases in a strained effort to find a meeting of the minds. The Court of Appeals' partial reconstruction of the settlement talks (App. at A8-A10) reads more like a one-sided argument of why the District Court *could* have found a meeting of the minds than a convincing demonstration of why the Court of Appeals' interpretation is the only rational one.

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[1] *E.g., Bobbie Brooks, Inc. v. International Ladies' Garment Workers Union*, 835 F.2d 1164, 1168 (6th Cir. 1987) (affirming district court's decision regarding settlement validity and enforceability under "clearly erroneous" standard).

By relying on its own interpretation of a cold transcript, without deference to the District Court's findings, the Court of Appeals invaded the province of the District Court as fact-finder. As this Court stated in *Anderson*:

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much.

470 U.S. at 574-575.

The instant case, like *Anderson*, may be a case in which both the District Court and the Court of Appeals arrived at logical and plausible interpretations of an ambiguous record. But *Anderson* holds that it is in precisely such cases that the District Court's findings must control. This Court should grant certiorari to clarify the respective roles of the District Court and the Courts and Appeals in deciding issues of fact.

II. This Court should grant certiorari to advance the federal policy of encouraging voluntary settlements.

Eaton recognizes that there is a strong federal interest in promoting voluntary settlements. "By the same token, judges must resist the temptation to dismiss a case prematurely before a settlement has truly been finalized." *Higbee v. Sentry Ins. Co.*, 253 F.3d 994, 995 (7th Cir. 2001) (reversing finding that agreement in principle reached during settlement conference constituted binding settlement, where agreement in principle left material issues unresolved).

When courts strain too hard to find settlement agreements, they discourage settlement in future cases. If oral settlement discussions become a game of "gotcha" in which every passing expression of assent may be scrutinized on appeal for evidence of a meeting of the minds, parties and their counsel would be wise to avoid oral settlement negotiations altogether lest they be trapped into premature settlements.

The Second Circuit Court of Appeals recognized this danger in *Ciaramella v. Reader's Digest Ass'n*, 131 F.3d 320 (1997). One of the parties to that case urged the Second Circuit to adopt a federal rule of decision that an oral settlement is binding whenever the parties agree on all material terms – even if one of the parties does not intend to bind itself until written terms are negotiated and executed.

The Second Circuit rejected this suggestion as contrary to federal policy: "Enforcing premature oral settlements against the expressed intent of one of the parties will not further a policy of encouraging settlements. People may hesitate to enter into negotiations if they cannot control whether and when tentative proposals become binding." 131 F.3d at 323. *See also Winston v. Mediafare Entertainment Corp.*,

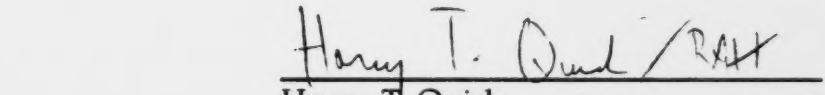
777 F.2d 78, 80 (2nd Cir. 1985) ("Because of this freedom to determine the exact point at which an agreement becomes binding, a party can negotiate candidly, secure in the knowledge that he will not be bound until execution of what both parties consider to be final document [sic].").

The Court of Appeals' finding that the parties' tentative settlement discussions constituted a binding settlement agreement not only works an injustice in the instant case, but also discourages settlement of future cases. This Court should grant certiorari to advance the federal policy of encouraging voluntary settlements.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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September 10, 2001

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

99-1073
The CITY OF DETROIT,
Plaintiff-Appellee,

v.

GEORGE SIMON; JOSEPH SIMON; NORINA SIMON; SHIRLEY SIMON; MAURICE TAYLOR; MADELINE TAYLOR; U.S. GROUP, INC., A MICHIGAN CORPORATION; U.S. EQUIPMENT COMPANY, A MICHIGAN CORPORATION,
Defendants-Appellants,

EATON CORPORATION, an Ohio corporation,
Defendant.

99-1128
THE CITY OF DETROIT,
Plaintiff-Appellant,

v.

Nos. 99-1073/1128

GEORGE SIMON; JOSEPH SIMON; NORINA SIMON; SHIRLEY SIMON; EATON CORPORATION, AN OHIO CORPORATION,
Defendants-Appellees,

MAURICE TAYLOR; MADELINE TAYLOR; U.S. GROUP, INC., A MICHIGAN CORPORATION; U.S. EQUIPMENT COMPANY, A MICHIGAN CORPORATION,
Defendants.

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 91-75348 - Avern Cohn, District Judge.

Argued: Nov. 28, 2000.

Decided and Filed: April 16, 2001.

Before: NELSON, SILER, and CLAY, Circuit Judges.

COUNSEL

ARGUED: Robert Charles Davis, DAVIS LAW GROUP, Mt. Clemens, Michigan, Eric J. Magnuson, RIDER, BENNETT, EGAN & ARUNDEL, Minneapolis, Minnesota, for Defendants. Ruben Acosta, FINK, ZAUSMER & KAUFMAN, Detroit, Michigan, for Plaintiff. **ON BRIEF:** Robert Charles Davis, DAVIS LAW GROUP, Mt. Clemens, Michigan, Patrick F. Gordon, James H. Russell, WINSTON & STRAWN,

Chicago, Illinois, Harry T. Quick, MARTINDALE, BRZYTWA & QUICK, Cleveland, Ohio, for Defendants. Ruben Acosta, FINK, ZAUSMER & KAUFMAN, Detroit, Michigan, for Plaintiff.

OPINION

DAVID A. NELSON, Circuit Judge.

This is an environmental protection case in which the plaintiff (the City of Detroit) thought it had reached a settlement with one of the corporate defendants (Eaton Corporation) during the second day of trial. When the trial court was advised that Eaton and the city had resolved their differences, the terms of the settlement were placed on the record in open court. Some weeks later, however, Eaton denied that there had been a meeting of the minds with respect to the scope of the "contribution protection" (*i.e.*, indemnification against demands for contribution among tortfeasors) that Eaton was to receive from the city. The city's position was and is that the record contains a clear expression of agreement on the scope of such protection.

Professing itself unable to determine precisely what the parties had come to agreement on, the trial court denied a motion by the city for entry of a settlement judgment. The case was eventually tried to completion, and a final judgment was entered on all claims.

Upon review, we conclude that the trial court erred in declining to hold Eaton to the settlement it had said it was accepting. The record, as we read it, shows that the city's lawyer adequately clarified the scope of the agreed contribution protection. The record further shows that

Eaton's lawyer explicitly acknowledged that the clarification was correct. Insofar as the district court subsequently found that the record did not manifest a meeting of minds, we are satisfied that the court's finding was clearly erroneous.

Both the city and the remaining defendants challenge other aspects of the final judgment as well. Unpersuaded, we shall reject these challenges.

I

For a period of several decades ending in 1973, as we understand the uncontested facts, subsidiaries or corporate predecessors of Eaton Corporation owned and occupied a tract of industrial real estate located at the intersection of French Road and Grinnell Avenue in the City of Detroit. There were several buildings on the site, including a factory, a warehouse, a garage, a boiler house, and some office buildings.

Various firms occupied the property before and after Eaton's occupancy. Different occupants disposed of different hazardous wastes on the site. The contaminants included polychlorinated biphenyls ("PCBs"), petroleum, and petroleum by-products such as ethyl benzene, toluene, and xylene.

During a period that ended in 1989 the property was occupied by defendant U.S. Equipment Co., a wholly-owned subsidiary of defendant U.S. Group, Inc. The latter corporation is connected with defendants George, Joseph, Norina and Shirley Simon. It will be convenient for us to refer to the Simons, U.S. Equipment, and U.S. Group collectively as "the Simon group."

The City of Detroit acquired the real estate by condemnation in 1989. The purpose of the city's acquisition was to clear

flight paths for a municipal airport located on the far side of a railroad track that runs next to the property.

The city demolished the factory and other buildings, cleaned up the PCBs, and, through consultants, made a detailed survey of the remaining contaminants. The city then brought the instant lawsuit against the Simon group, Eaton, General Motors Corporation (a sometime lessee of the property) and others. The relief sought included both recovery of the environmental cleanup and investigation costs already incurred by the city and entry of a declaratory judgment with respect to future remediation costs. The city's claims were based in part on the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. §§ 9601 *et seq.* ("CERCLA"), and the former Michigan Environmental Response Act ("MERA"), M.C.L. §§ 299.601, *et seq.*, now recodified in Part 201 of the Michigan Natural Resources and Environmental Protection Act, M.C.L. §§ 324.20101, *et seq.* ("NREPA").

In 1994 the city moved for partial summary judgment on a claim that the Simon group was responsible for all of the PCB cleanup costs. The district court granted the motion, ultimately awarding the city $156,619.91 for reimbursement of its costs plus attorney fees. General Motors was dismissed with the acquiescence of the city.

On March 6, 1995, the case went to trial on the remaining claims against the Simon group and Eaton. Shortly before the trial was to resume the next day, the court was informed that Eaton and the city had reached a settlement. The terms of the settlement were promptly memorialized, at the court's request, in proceedings conducted on the record. With the reader's indulgence, we shall describe these proceedings in some detail.

After stating his understanding that there had been a resolution of the dispute between the city and Eaton, but no resolution of the dispute between the city and the Simon Group, the trial judge turned to the city for an account of what was being agreed to. Mr. David H. Fink, one of the lawyers representing the city, responded as follows:

> "The terms of the settlement with Eaton will be a full and final settlement in the dispute between the City of Detroit and the Eaton Corporation would be the following:
> One, the payment by [E]aton of $1.2 million cash; that is, no trust funds or anything. It would be one straight payment of $1.2 million.
> Two, the City of Detroit would provide contribution protection with respect to any claims brought in the past or in the future with respect to this site *by the* *623 *City of Detroit*. That, of course, would include the pending claims against the Simons but would also include any other claim that might be brought *by the City of Detroit* against any other parties. They would have contribution protection.
> *There would not be any guarantee of indemnification as to third-party claims*. The City is not aware of any third-party claims that have been brought or threatened in any way with respect to the site with the exception of issues related to EPA and EPA has long since given up with respect to the Simon defendants." (Emphasis supplied.)

Mr. Fink went on to describe two obligations to be assumed by Eaton: an obligation to cooperate with the city on a statutory claim not directly relevant here, and an obligation to cooperate on the city's claims against other parties. More specifically, as far as the latter obligation was concerned, Mr. Fink explained that Eaton was agreeing not to object to the city's working with experts initially retained by Eaton, it being understood that Eaton would not have to incur further costs in this connection.

At this point, the transcript shows, Mr. James H. Russell, environmental litigation counsel for Eaton, asked for permission to confer with "co- counsel." (Mr. Russell may have been referring here to Eaton house counsel Sharon O'Flaherty, or lead trial counsel Harry T. Quick, or both.) After an off-the-record discussion between counsel, Mr. Russell went directly to the expert witness point; he offered no objection or other comment regarding Mr. Fink's explanation of the scope of the protection Eaton would receive against claims for contribution among tortfeasors.

What Mr. Russell said was this:

"We do not expect a problem in the operation of the last point that Mr. [F]ink has just identified. I don't know that we're prepared to put that into the agreement.

The reason is that the experts that Mr. Fink would wish to have are independent contractors; they are outside experts."

The court then proposed a way of resolving the expert witness problem, if it was a problem, and Mr. Russell responded to the court's proposal by saying "[w]e have no objection."

Mr. Fink, on behalf of the city, then returned to the subject of contribution protection:

"Your Honor, the only item on the list that I see that will require any 'fl [e]shing out' in the agreement itself is the form of the contribution protection and I just want to be clear from the City's p[er]spective and that is that we would expect that any claims brought against Eaton *that arise from a claim brought by the City,* that the defense of that claim would be tendered to the City of Detroit and the City would have to affirm, as it would, as to the absolute guarantee to provide that contribution protection brought by the City of Detroit but then that the City would, of course, having taken

on that responsibility, would control the defense of the claim." (Emphasis supplied.)

At this juncture the court offered a suggestion with regard to the final wording of the agreement with respect to such claims:

"Well, let me suggest this: If there is any dispute, that is to say, as to the wording of *this portion* of the agreement you will each submit your respective draft to the Court and the Court will choose between the two." (Emphasis supplied.)

Adding that he envisioned the possibility that "there may be a dispute over the phraseology" of this portion of the agreement, the judge described his proposal for resolving any such dispute as "baseball arbitration." Mr. Russell, speaking on behalf of Eaton, said that the court's suggestion was "fine with us." Mr. Fink indicated that the suggestion was acceptable to the city as well, "as long as the Court did not find what I stated on the record is objectionable."

The judge assured Mr. Fink that "I don't find it objectionable." Mr. Fink explained that he wanted "to avoid any misunderstanding on the record." In response, the court asked Mr. Russell if he agreed in principle with what Mr. Fink had said. Mr. Russell answered in the affirmative: "In principle, yes." Mr. Russell then repeated that Eaton had no problem with the court's "baseball arbitration" suggestion.

The transcript continues as follows:

"MR. FINK: Your Honor, experience suggests to me is the best thing at this point would be to be candid with the Court about where the disagreement fell at one point [in the settlement negotiations] to be sure that the--

THE COURT: All right, go ahead.

MR. FINK: At one point in discussions among Counsel there was a suggestion that--by opposing counsel--that contribution protection might involve the City reimbursing

Eaton for the cost of defending claims under the circumstances--"

The trial court, unfortunately, did not allow Mr. Fink to finish his sentence. Cutting Mr. Fink off as he was starting to describe what Eaton had suggested about contribution protection, the court said "No, that's not part of this. That's not contribution protection."

The court's interjection evoked the following response:

"MR. FINK: The City, obviously, would be only able to control the defense if it accepted liability and *it must accept liability in any kind of contribution action that may arise from City action.* Then we do have an agreement." (Emphasis supplied.)

Turning to Mr. Russell, the court asked if he had any problem with what Mr. Fink had said. The following exchange ensued:

"MR. RUSSELL: I'm sorry, I missed the first part of it and I wonder if he would be good enough to repeat it?

MR. FINK: Contribution protection is any claim brought against us by anyone, the Simons or anyone else in connection with this, would be tendered by us to the plaintiff under the contribution protection. Plaintiff then wants the right to control that litigation.

That's the nature of contribution protection, they want to be immunized from any affect of any contribution other party."

Eaton's brief on appeal characterizes this particular statement as "uninterpretable." The characterization strikes us as apt. The trial judge, however, thought he understood what Mr. Fink was trying to say:

"THE COURT: What Mr. Fink is saying is that if you incur any expense as a consequence of being named, other than

expenses relating to any alleged breach of the City's obligation, they're your own.
MR. RUSSELL: We agree with that.
THE COURT: Isn't that what you said?
MR. FINK: If I didn't, I should have.
MR. RUSSELL: That's fine."

Evidently wanting to get back to the point he had been about to make when interrupted by the court, Mr. Fink then spoke as follows:

"MR. FINK: There was one thing that was said by Mr. Russell; I don't think it was intentionally excluded but I want to be clear. He referenced 'any claim brought against Eaton.' Any claim brought against Eaton *arising from a claim brought by the City of Detroit.* It's *not* indemnification through any third-party to be filed." (Emphasis supplied.)

These words, it seems to us, are far from uninterpretable. They are entirely consistent with what had already been said several times, and, taken in context, we believe their meaning is clear. Mr. Fink was obviously saying that the city would protect Eaton against any claim for contribution that arose from a claim the city was asserting against the party seeking contribution. Mr. Fink was also saying that the city would not indemnify Eaton against third- party claims that did not arise from claims asserted by the city.

Mr. Fink's clarity on this point is fully matched by the clarity of the response given by counsel for Eaton:

"MR. RUSSELL: *That's correct.*" (Emphasis supplied.)

"That's correct," we take it, means what it says. We do not interpret Mr. Russell's response as meaning "that's not correct." Yet on April 28, 1995, a little over seven weeks after telling the court and counsel that Mr. Fink was correct in his description of what the parties were agreeing to, Mr. Russell

sent Mr. Fink a letter asserting that "[t]he form of protection Eaton would receive was never clarified by the City...." Tendered with the April 28 letter was a proposed settlement agreement containing an indemnity provision so broad as to be irreconcilable, in our judgment, with the agreement in principle memorialized in the March 7 transcript.

The settlement agreement proposed by Eaton on April 28 would have obligated the city to indemnify Eaton against "all claims" involving the city and/or Eaton asserted by "any or all" persons or entities, governmental or nongovernmental, in connection with contamination at the French Road-Grinnell Avenue site. There was no exclusion of third-party claims not arising from claims asserted by the city. Contrary to the understanding reflected in the March 7 transcript, the new proposal called for indemnification of Eaton by the city against any such claims, as well as against contribution claims arising from claims by the city.

The city did not sign the proffered agreement, so Eaton moved to have the case reset for trial. A brief opposing this motion was filed by the city, together with a motion for entry of a settlement judgment. The city's proposed form of judgment would have required the city to "defend and hold Eaton harmless from and against any and all claims or demands for contribution or lawsuits or other actions for contribution *brought against Eaton as a direct result of any claim, demand, lawsuit or other action brought by the City* in connection with environmental contamination of the real property and improvements located at the intersection of French Road and Grinnell Avenue...." (Emphasis supplied.)

Eaton opposed the city's motion in a brief accompanied by affidavits from Messrs. Russell and Quick. The Russell affidavit contained the following averments, among others:

-- that in the environmental legal community, as Mr. Russell believed, "contribution protection" was widely understood to be a term of art signifying that upon the settlement of a CERCLA claim, *all* contribution liability of an alleged joint tortfeasor is extinguished;
-- that this usage stemmed from § 113 of CERCLA (42 U.S.C. § 9613) (we quote the relevant statutory language in the margin);[1]
-- that in settlement discussions conducted with the city's counsel prior to March 7, 1995, Mr. Russell had made it clear that Eaton would require broad and final protection from future claims;
-- that Mr. Russell had used the term "contribution protection" in formulating Eaton's settlement offers, and in so doing he had been referring-- as he believed Mr. Fink had been referring--"to statutory contribution protection under § 113 of CERCLA ...;"
-- that settlement discussions conducted under the district court's auspices on the morning of March 7, 1995, had failed, and the parties had been ordered back into the courtroom to recommence trial; then, seconds before the judge re-entered the courtroom, Mr. Fink approached Eaton's trial table and said "We'll take the $1.2;"
-- that there was no discussion of any other component of the settlement until the court asked Mr. Fink to summarize the agreement; and

---

[1]"A person who has resolved its liability to the United States or a State in an administrative or judicially approved settlement shall not be liable for claims for contribution regarding matters addressed in the settlement. Such settlement does not discharge any of the other potentially liable persons unless its terms so provide, but it reduces the potential liability of the others by the amount of the settlement." 42 U.S.C. § 9613(f)(2).

-- that "[s]ince it was clear to both counsel for Detroit and the Court that the settlement between Eaton and Detroit needed to be reduced to writing, [Mr. Russell] did not regard the comments of counsel before the Court in open court to set forth the details of the parties' proposed settlement."

Attorney Quick's affidavit, which was much shorter, averred in essence that

-- once settlement discussions had commenced, Mr. Quick made it clear to the city's counsel that Eaton intended to condition settlement upon the city's providing Eaton "complete protection ... from any future claims by the Michigan Department of Natural Resources, adjoining landowners and/or subsequent purchasers of the subject property;" and

-- Mr. Fink told Mr. Quick that the city was prohibited by law from lending its credit so as to provide Eaton with indemnity, but that Mr. Fink, knowing what Eaton desired, indicated that equivalent protection could be provided with respect to such claims.

On August 8, 1995, after hearing oral argument on the pending motions, the district court announced from the bench that it was granting Eaton's motion to set the case for trial and was denying the city's motion for entry of a settlement judgment. In explaining its thinking, the court made these observations, among others:

"The statutes involved are complex. The distinction the parties draw on what was said on March 7th, 1995 involve arcane concepts of law and are based on a specialized glossary. The City may well be right that the protection for Eaton it agreed to was limited and that Eaton's concerns are at best speculative and conjectural."

"On the other hand, Eaton agreed to pay $1,[2]00,000.00 with, it says, the expectation it would have peace of mind and get on with its corporate life. For the Court to sanction

the City's view of the agreement reached on March 7th, 1995 would be inappropriate."

* * *

"For the reasons stated above, and for reasons of judicial economy and prudence, as well as the inability of the Court to determine precisely what the parties came to agreement on March 7th, 1995 ... this case [must] go to trial."

The case did go to trial, a request for certification of an interlocutory appeal having been denied, and a final judgment was entered on December 10, 1998. That judgment, among other things,

-- fixed Eaton's total liability, as of October 31, 1998, at $301,415;

-- fixed the Simon group's liability as of that date at $80,683, exclusive of liability for the costs associated with the cleanup of PCBs;

-- finalized the $156,619.21 judgment against the Simon group for PCB costs, and set the interest that had accrued thereon through October 31, 1998, at $77,599; and

-- declared Eaton and the Simon group liable for specified percentages of future recoverable "Response Costs" and "Response Activity Costs," subject to the proviso that there should be no liability for costs "[i]ncurred to achieve a clean up level in excess of the industrial clean up category in Mich.Comp.Laws § 324.20120a(1)(d)."

The city raises two issues on appeal: (1) whether the district court erred in refusing to enforce the settlement agreement memorialized in the proceedings held on March 7, 1995, and (2) whether the district court erred in limiting the defendants' liability for future cleanup costs to those costs incurred in achieving an "industrial clean up" as defined in NREPA. The Simon group raises a single issue on appeal: whether a failure by the city to comply with certain notice provisions of the

federal National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"), 30 C.F.R. Part 300, precluded recovery of the PCB costs. We shall address these issues in the sequence indicated.

II
A

As we have seen, Eaton represents that during the negotiations that preceded the March 7 memorialization of the settlement, Mr. Russell used the phrase "contribution protection" as referring to the complete discharge of contribution liability prescribed by 42 U.S.C. § 9613(f)(2). Maybe so, but the phrasing of the representation strikes us as peculiar.

We have no reason to doubt that Eaton sought the broadest possible protection against claims for contribution. Eaton's affidavits so indicate, and during the March 7 courtroom colloquy Mr. Fink mentioned this as an issue over which there had been disagreement. As will be obvious from examination of the text of § 9613(f)(2), however (see note 1, *supra*), Eaton's assertion that both parties were understood to be referring to "statutory contribution protection under § 113 of CERCLA [42 U.S.C. § 9613]" would mean, if true, that both parties were misreading CERCLA. We find it curious that sophisticated lawyers such as these should not have known what § 113 of CERCLA actually says.

What it says is that an administrative settlement (or a judicially approved settlement) of "liability to the United States or a State" will protect the settling party against liability on claims for contribution. Strictly speaking, then, "statutory contribution protection" can exist only when the settlement is with the federal government or a state government.

The city of Detroit is certainly not "the United States." And Eaton had no reason to suppose that the city could be equated with "a State." We know this is so because--on motion of Eaton itself--the district court had long since entered an opinion and order holding that "municipalities are *not* within the scope of the term State...." (Emphasis supplied.) (R.E. 43, Memorandum and Order of July 10, 1992.) There is thus no way that the *city's* settlement of its environmental claims against Eaton could have entitled Eaton to the statutory contribution protection prescribed by CERCLA where a *state* settles its CERCLA claims.

The limited availability of statutory contribution protection does not mean, of course, that Eaton could not have asked the city to provide extra-statutory indemnification against any and all claims for contribution, whether stemming from claims asserted by the city or not. Eaton obviously did ask for such indemnification. The agreement Eaton may have wanted, however, was not the agreement Eaton ultimately accepted.

Whether or not there had been a meeting of minds on the scope of contribution protection prior to the proceedings conducted on the record on the morning of March 7, 1995--and for purposes of this opinion we shall assume that the minds of the parties had not previously met on this issue--the March 7 transcript clearly manifests a meeting of minds at that point. The summary of the deal placed on the record by Mr. Fink in open court on March 7, 1995, makes it abundantly clear that the city's commitment to hold Eaton harmless against contribution claims advanced by other alleged tortfeasors would be limited to situations where the other tortfeasors were asking Eaton for exoneration in respect of claims asserted by the city itself. Whether Eaton might still have wanted indemnification broader than that is immaterial--for Mr. Fink repeatedly explained, in the clearest of terms, that broader indemnification was simply not on offer.

The city's commitment, as Mr. Fink explained without ambiguity, would be to provide contribution protection "with respect to any claims brought ... by the city of Detroit"--both the pending claims against the Simon group and "any other claim that might be brought by the city of Detroit against other parties." Such contribution protection, Mr. Fink made clear, would not extend to third-party claims not stemming from demands by the city: "There would not be any guarantee of indemnity as to third-party claims."

If Eaton was unwilling to accept this limitation, it had an obligation to say so. Yet it voiced no objection at all. On the contrary, when Mr. Fink repeated that the city was talking about "any claims brought against Eaton that arise from a claim brought by the city," Mr. Russell explicitly stated that the company agreed, in principle, with what Mr. Fink had said. And when, to avoid even the slightest possibility of misunderstanding, Mr. Fink again made it clear that the contribution protection to be provided by the city was "not indemnification through any third-party" but was limited to protection against "[a]ny claim brought against Eaton arising from a claim brought by the City of Detroit," Eaton agreed again: "That's correct," Mr. Russell said on the record.

There was nothing the least bit arcane about this. The city's interpretation of the agreement reached on March 7, 1995, is the interpretation to which any objective reading of the transcript necessarily leads.

If Mr. Russell's own subjective understanding of what was being said happened to be deficient for some reason, this could hardly change the result. Whether the minds of the parties are to be deemed to have met on an oral settlement agreement is "judged by an *objective* standard, looking to the express words of the parties and their visible acts." *Groulx v.*

Carlson, 176 Mich.App. 484, 491, 440 N.W.2d 644, 648 (1989). (Emphasis supplied.)

The express words and visible acts of the parties in the instant case leave us with the firm conviction that there was a mutual manifestation of intent to accept a settlement on the terms stated by Mr. Fink. And we are strengthened in this conviction by the fact that house-counsel for Eaton was present at the March 7 session and never expressed the slightest reservation about the agreement that was being placed on the record. See *Michigan Bell Telephone Co. v. Sfat*, 177 Mich.App. 506, 513, 442 N.W.2d 720, 723 (1989) ("because defendant was present when the terms of the settlement agreement were read in open court and he voiced no objections thereto, we must conclude that it met with his approval").

If Eaton's lawyers were under the impression that, as a matter of law, Eaton could not be bound by anything said in the courtroom because of the fact that the details of the agreement would be fleshed out in writing later, their impression was mistaken. See *Pedder v. Kalish*, 26 Mich.App. 655, 182 N.W.2d 739 (1970). Eaton was obviously not at liberty to disavow the substance of that to which it was agreeing in open court. Just as Eaton was not free to decide that it would pay only $600,000 after having agreed to pay $1,200,000, so also was it bound by its agreement to accept limited contribution protection in lieu of the broad contribution protection it had asked for originally.

Our conclusion is in no way undermined by the parties' recognition that there might be future disagreement over how the principles agreed to on March 7 should be worded in the formal settlement agreement that was to follow. The district court's "baseball arbitration" proposal represented a sensible way of resolving any such disagreement. The court was

obviously not proposing to arbitrate the question of whether, if one or the other of the parties should subsequently have a change of heart, that which had already been agreed to in principle could be repudiated. And what surfaced on April 28, 1995, when Eaton tendered its formal settlement document, was not a mere disagreement over the nuances of language intended to capture a principle on which there was still mutual agreement; what surfaced, rather, was an apparent attempt by Eaton to repudiate the agreement itself. The district court clearly erred in deciding to let Eaton get away with this.

B

The city contends that the district court also erred when it limited the defendants' total liability for future costs to what would be necessary to reach the "industrial" cleanup level specified in M.C.L. § 324.20120a(1)(d). Our decision with regard to the settlement renders this issue moot as to Eaton, but the issue remains alive as far as the Simon group is concerned.

The city maintains that there is no statutory authority for capping liability for future cleanup costs. Moreover, according to the city, NREPA expressly forbids the imposition of such a cap by providing that the "cleanup category proposed shall be the option of the person proposing the remedial action, subject to department approval, considering the appropriateness of the categorical criteria to the facility." M.C.L. § 324.20120a(1).

We are not persuaded. With a few exceptions not relevant here, the types of response costs recoverable under CERCLA are limited to those that are "necessary" in light of the nature and type of property to be cleaned up. See 42 U.S.C. § 9607(a)(4)(B). Several federal courts have recognized that recovery of environmental cleanup costs incurred to achieve

a higher level than the use of the property necessitates would violate CERCLA's requirement that recoverable response costs be "necessary." See, *e.g., G.J. Leasing Co. v. Union Electric Co.*, 54 F.3d 379, 386 (7th Cir.1995); *Southfund Partners III v. Sears, Roebuck and Co.*, 57 F.Supp.2d 1369, 1378 (N.D.Ga.1999); *M.R. (Vega Alta), Inc. v. Caribe General Electric Products, Inc.*, 31 F.Supp.2d 226, 233 (D.Puerto Rico 1998).

Similarly, NREPA provides that the cleanup proposed should be "appropriate" in light of the facility's categorical criteria, see M.C.L. § 324.20120a(1), and it also provides that recoverable costs must be "necessary." See M.C.L. § 324.20126a(1)(b). As NREPA (formerly MERA) was patterned after CERCLA, it should be construed in accordance with the federal statute. See *Freeport-McMoran Resource Partners Ltd. Partnership v. B-B Paint Corp.*, 56 F.Supp.2d 823, 838 n. 7 (E.D.Mich.1999), and *Kalamazoo River Study Group v. Rockwell International*, 3 F.Supp.2d 799, 803-804 (W.D.Mich.1998), *rev'd on other grounds*, 228 F.3d 640 (6th Cir.2000).

The property at issue in this case has a long history of industrial use. To require former occupants to assume liability for cleanup costs going beyond the level necessary to make the property safe for industrial use would be to provide an unwarranted windfall to the beneficiary of the cleanup.

C

Finally, we come to the Simon group's argument that the district court erred in holding the group liable for the PCB cleanup costs, the city having failed to comply with the National Contingency Plan before incurring those costs. The Simon group maintains that the city failed to allow 30 days for comment and failed to conduct a public meeting on the PCB cleanup program, as required under 40 C.F.R. § 300.700(c)(6).

Whatever the merits of this argument may be, the Simon group ignores the fact that the district court granted summary judgment on the city's PCB claim not only under CERCLA, the federal cost-recovery statute, but also under NREPA, the Michigan cost-recovery statute. The Michigan Court of Appeals has squarely held that substantial compliance with the NCP is not a prerequisite to cost-recovery under NREPA. See *City of Port Huron v. Amoco Oil Co.*, 229 Mich.App. 616, 633, 583 N.W.2d 215, 223 (1998), leave to appeal denied, 610 N.W.2d 548 (Mich.2000). We defer to the Michigan court's interpretation of Michigan law. See, *e.g., Cooper v. Scroggy*, 845 F.2d 1385, 1394 n. 3 (6th Cir.1988).

In its reply brief, the Simon group argues for the first time that recovery for PCB contamination under NREPA is foreclosed because the state statute is preempted by the Toxic Substances Control Act, 15 U.S.C.A. § 2601 *et seq.* We generally decline to address arguments presented for the first time in a reply brief. See *Aetna Cas. & Sur. Co. v. Leahey Construction Co.*, 219 F.3d 519, 545 (6th Cir.2000). It would be particularly inappropriate for us to address the Simon group's argument under the circumstances of this case, where the argument was never presented to the district court and is offered for the first time after nearly a decade of litigation. See *Noble v. Chrysler Motors Corp., Jeep Div.*, 32 F.3d 997, 1002 (6th Cir.1994).

The judgment entered by the district court is **AFFIRMED** in part and **VACATED** in part, and the case is **REMANDED** for further proceedings not inconsistent with this opinion.

B1

99-1128

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

The CITY OF DETROIT, Plaintiff-Appellant,	)	FILED
	)	JUN 11 2001
v.	)	
	)	LEONARD GREEN, Clerk
GEORGE SIMON, ET AL., Defendants-Appellees,	)	
	)	ORDER
MAURICE TAYLOR	)	
Defendants.	)	

BEFORE: NELSON, SILER, and CLAY, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Leonard Green, Clerk

Supreme Court, U.S.
FILED

01 459 SEP 10 2001

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

EATON CORPORATION,

Petitioner

v.

CITY OF DETROIT,

Respondent

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For the Sixth Circuit

SUPPLEMENTAL APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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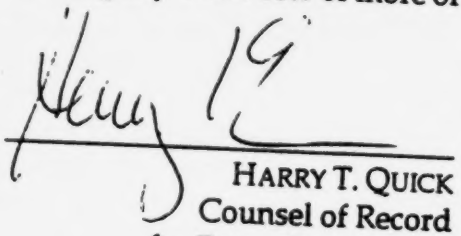
48pp

SUPPLEMENTAL APPENDIX IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Eaton Corporation makes the following disclosure statement pursuant to S. Ct. R. 29.6:

Eaton Corporation is publicly held and has no parent corporation. No publicly held company owns 10% or more of Eaton Corporation's stock.



HARRY T. QUICK
Counsel of Record
for Eaton Corporation

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Respectfully submitted,

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UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CITY OF DETROIT, a Michigan Municipal corporation,

Plaintiff,

vs.

Civil Action
No. 91-CV-75348-DT

GEORGE SIMON, JOSEPH SIMON, NORINA SIMON, SHIRLEY SIMON, MAURICE TAYLOR, MADELIENE TAYLOR, EATON CORPORATION, an Ohio corporation, U.S. GROUP, INC., a Michigan corporation, U.S. EQUIPMENT CO., a Michigan corporation, jointly and severally,

Defendants,

and

GEORGE SIMON, JOSEPH-SIMON, NORINA SIMON, SHIRLEY SIMON, U.S. GROUP, INC. , a Michigan corporation, and U.S. EQUIPMENT CO., a Michigan corporation,

Cross-Plaintiffs,

vs.

EATON CORPORATION, an Ohio corporation,

Cross-Defendant.

Proceedings had in the above-entitled matter before HONORABLE AVERN L. COHN, District Judge, United States District Court, Detroit, Michigan, on Tuesday, August 8, 1995.

APPEARANCES:

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U.S. Equipment Company

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WITNESS PAGE

No witnesses called at this time

EXHIBITS

Admitted

No exhibits offered at this time

Detroit, Michigan
Tuesday, August 8, 1995

- - -

THE COURT: Let's everybody be seated. Why don't we give our appearances to the reporter.

MR. FINK: Your Honor, David Fink, appearing on behalf of the City of Detroit.

MR. ACOSTA: Ruben Acosta, your Honor, appearing on behalf of the City of Detroit, also.

MR. QUICK: Harry Quick for Eaton Corporation.

MR. RUSSELL: Jim Russell for Eaton Corporation.

MS. O'FLAHERTY: Sharon O'Flaherty for Eaton Corporation.

MR. DAVIS: Robert Davis, Simon Defendants.

MR. FERREL: Tim Ferrel, Simon Defendants.

THE COURT: Okay. Let's do this in some sort of orderly fashion. What motions do you have, Mr. Fink?

MR. FINK: Your Honor, we have today a Motion for Entry of Settlement Judgment against Eaton Corporation. And we have a Motion for Summary Judgment against the Simon Defendants.

THE COURT: What motions does Eaton have?

MR. RUSSELL: Your Honor, we have a motion to reset this matter for trial on the same day on which the trial proceeds before. And we have on trial, your Honor, a response to the Plaintiff's Motion for Entry of Settlement Judgment, as you know.

THE COURT: I know.

MR. RUSSELL: And then we have a reply to the Simon's motion in opposition.

THE COURT: What motions does Simon have?

MR. DAVIS: Your Honor, the Simons have a Motion for Summary Judgment on the issue of liability against the City, and a Motion to Adjourn Trial.

THE COURT: Do you have anything you want to add to your motion papers, Mr. Fink?

MR. FINK: I don't believe I do, your Honor. I simply wanted to ask one question, though. We were just advised, I believe, that there's a motion for adjournment of trial. If it's a written motion, I don't think I've seen it, unless it was a response in the alternative to the Eaton motion.

MR. DAVIS: No, we have a response to their Motion to Set Trial, and we filed a Motion for Adjournment.

MR. FINK: I doubt that it would be complex for us to respond to that, your Honor, but I don't think I have it.

MR. DAVIS: All we did, your Honor, was for the reasons set forth in our response to Eaton's Motion to Set Trial.

THE COURT: It was filed August 4th.

MR. DAVIS: Right.

THE COURT: Do you have anything further?

MR. FINK: Until I see that motion, I don't know. I don't think we do, though, your Honor.

THE COURT: Mr. Quick or Mr. Russell, do you have anything to add to your papers?

MR. QUICK: No, your Honor.

MR. RUSSELL: No, your Honor.

THE COURT: Mr. Simon, do you have anything to add to your papers?

MR. DAVIS: Your Honor, no, but with respect to the City's Motion for Liability against us on the MIRA issue, I think that the City and I have discussed that and have come to some terms that would result in me not opposing that motion.

THE COURT: Okay. I guess the only thing is for the Court to make its decision. Did you have something, Mr. Fink?

MR. FINK: Well, I may have misconstrued the Court's

original question as to whether we had anything other than our papers. Obviously we are prepared to present at least some brief oral argument in support.

THE COURT: Well, I asked you if you had anything more you wanted to say. If you have something more you want to say, say it.

MR. FINK: I misconstrued what the Court had stated, had asked. I would simply call the Court's attention, I'm sorry, yes, I would like to say something else with the Court's permission.

THE COURT: Go ahead.

MR. FINK: I would like to keep in the, if I understand the Court's perspective today, wanting to limit our response or our comments to things that haven't already been said in the briefs.

THE COURT: Well, I think that's customary for a Court to want to limit comments to something that hasn't already been said. On the assumption that the Court has read the brief, and if what's said in the brief is repeated to the Court, then all that's happened is what the Court's already familiar with has been said to the Court.

That's the purpose of oral argument, to enlarge upon what the Court previously knew of the position. That's my understanding of the purpose of oral argument. All the hornbooks I've ever read on oral argument have said don't regurgitate the brief.

MR. FINK: And as such, the oral argument I wanted to offer was in response to the reply brief we received this week. And that is simply a response to point out a case that they cite in their brief, a Sixth Circuit case, the case of *Cutler v. National Distillers Products Company*, which at Page 622 contains the following statement by the Court of Appeals:

> "As was the case in Autura v Robinson, supra., and Massachusetts Casualty Insurance Company v Forman" –

And I would note to the Court that both of those cases were also cited by Eaton.

> "The purported settlement agreement here was never officially presented to the district court prior to the motion for entry of judgment thereon."

And we would simply say to the Court that that is the key distinction between the cases that they cited and the facts in our case and the cases that we have cited to the Court in our Motion for Entry of Settlement Judgment. In the cases they cited, the settlement was not placed on the record.

On the second day of trial, we came to this Court and indicated that we had a settlement. We then went through the important ritual of putting that settlement on the record. And while Defendants would quarrel with some of the transcription of what was stated on the record, I don't believe that, if read as a whole, that this Court can come away with any misunderstanding.

The Defendants would have us believe, I should say, the Eaton Defendant would have us believe that the parties agreed to on money only, leaving critical terms unresolved. That after I stated the decision, the agreement on the record, that while they disagreed with what I said on the record, they chose to not advise the Court that they so disagreed, and then they would have us all believe that in the middle of a trial with three live witnesses available for the City that day, and a deposition proceeding in Arizona, that this Court would allow the parties to all go home when they didn't have a settlement.

I won't go any further, your Honor, because I think that we have stated the essential points in our briefs. Although, of course, we are available to answer questions.

THE COURT: Anybody have anything more they want to say to the Court?

MR. RUSSELL: Your Honor, I had not intended to say anything, but -

THE COURT: I can't imagine that anything that's be said thus far should change your intentions.

MR. RUSSELL: Why don't I do this, your Honor, a see if I can reply in 60 seconds. Would that be acceptable w the Court?

THE COURT: Any amount of time you want, sir.

MR. RUSSELL: First of all, in environmen settlements, it's very common that the non-monetary eleme of settlement are the hard ones, the hardest ones to resol It's certainly true when you settle environmental cases w government agencies, and it's certainly true in private cro recovery litigation. So the fact that the non-monetary eleme of the settlement are unresolved shouldn't shock anybody this business, that's the rule.

Secondly, insofar as March 7, and I'll keep my second promise, I thought we were talking about contributi protection. This is the statute, as your Honor knows. Tha the statute that the Plaintiff pleaded, that's the term t Plaintiff used.

I thought we were going to reduce the contribution protection situation to written settlement agreement. That what the transcript says. And, your Honor, was kind enoug to offer help on that point should we have any difficulty.

If that were not the case, one might ask why t Plaintiff didn't ask us to sign the transcript, if it was definitive.

And, thirdly, we thought we were going to have a fu and final settlement. It's Eaton's right to not walk away fro just this litigation, but to walk away from this site, and that someday what they will do.

Lastly, in the case that Plaintiff attached to h response to Eaton's Motion to Set Trial, at the top of Page 1 there's some good language that perhaps your Honor note and I'm sure you probably did.

THE COURT: Wait a minute.

MR. RUSSELL: It's been the role of the District Court to -

THE COURT: Wait a minute. Wait a minute.

MR. RUSSELL: Okay. Top of Page 15.

THE COURT: Wait a minute. Wait a minute. Go ahead.

MR. RUSSELL: The top of Page 15 where they're citing the *Lang* case, I would not use the word "power," your Honor, but I would say a role to impose a settlement agreement when there was never a meeting of the minds, because a fact finder could not conclude that the parties intended that the agreement would be binding.

THE COURT: Without exception to the documents - execution of the documents by both parties.

MR. RUSSELL: Yes.

THE COURT: Is that the part?

MR. RUSSELL: Yes.

THE COURT: Oh, yes. That's found at Page 1256 of 53 Fed Rep 3rd, which would be the more appropriate way to submit it to the Court, it's now part of the reporting system.

MR. RUSSELL: Thank you, your Honor. I have only one other thing to add. If you'll note the part that the Plaintiff underscored on that page, or I guess you're referring to a different page than I am, but Plaintiff said there is no claim in this case that what transpired in the District Court hearing should not constitute settlement of the case. Well, that's the very point we're making. That's the very thing we believe in. Thank you, your Honor.

THE COURT: Does anybody have anything more they want to say to the Court than is in the papers? I want to be sure everyone has a full and complete opportunity to express themselves.

MR. DAVIS: Your Honor, on behalf of the Simon Defendants, we didn't file a response to the City's motion to establish our categorical liability under MIRA, and we would

offer right now that because this case has gone on a little bi
the law has changed. And in that, in those new amendment
there's a savings clause that reverts back to the old liabilit
scheme. And, your Honor, to the extent that the City
continuing to ask that we be named as a categorical liabl
party under that old scheme, we do not oppose their motion

THE COURT: Thank you. Is there anything mor
anybody wants to say?

MR. FINK: Finally, your Honor, if I may. The Eato
Defendants have again suggested that because this case wa
brought in part under CERCLA, that any reference t
contribution protection must be in the form that they viev
contribution protection under CERCLA.

First, I would call to the Court's attention a case at 84
F Supp 267 entitled *Akzo Coatings of America v Americar
Renovating Company*. The only reason I call that case to th
Court's attention, and your Honor had this argument, it wa
first seen by us in the pleadings that we received on Monday
in this form. The reason we reference this particular case, you
Honor, is because it is a case in which there was actually
settlement with the Federal Government. In that case
subsequent claim was brought by a party, and the defendan
says, since they've settled with the Federal Government, they
had contribution protection which would protect them from
any claim whatsoever. And the Court found there that claims
for public nuisance under state law was, in afct, not barred by
that so-called contribution protection.

Your Honor, this was not a case only under CERCLA
it was a case under MIRA. Throughout the settlement
discussions we indicated there would not be indemnification,
that was the reason I stated it on the record again, no
unlimited indemnification, and we did explain very clearly
that there would be protection related to contribution claims
only to the extent that those claims arose from claims brought
by the City of Detroit. That was something that I think was
very, very clear on the record. That's why we didn't just sign

the transcript. You don't enter a judgment by signing a transcript. That's why we filed a Motion for Entry of Judgment.

And, as the Court will note, our judgment tracks the words in the transcript very, very closely. We tried to keep it as close as possible to the actual words stated on the record in this courtroom, which were not objected to, and in fact, were affirmed by opposing counsel.

Thank you, your Honor.

THE COURT: This is an environmental clean up case. The case was filed on October 15, 1991 by the City of Detroit following its acquisition of the contaminated property.

In the acquisition documents, the City reserved the right to seek compensation for the cost of clean up. The complaint asserts a variety of claims under multiple statutes, against multiple defendants, including Eaton Corporation, which apparently owned the contaminated property from the mid '20's to the early '70's.

The course of litigation has been protracted and contentious. The case came to trial against Eaton on March 6, 1995. On March 7, 1995 the parties placed a settlement on the record. The settlement called for a definitive agreement to memorialize its terms.

Knowing the likelihood that the parties would disagree on the terms of the definitive agreement, the Court suggested that in the event of such disagreement, each party submit its version of the definitive agreement to the Court, and that the Court would then choose between the two versions, having in mind that each party's version would be consistent with the party's view of what had been agreed to on the record, and that the Court's role was to determine, as best it could, which version was most consistent with what had been agreed to on the record. Eaton agreed. The City equivocated.

The parties have been unable to agree on what was agreed to on the record. Eaton says it was paying

$1,300,000.00 for "peace of mind," and since it was clearly understood the City had no intention of actually cleaning up the contamination, it was also clearly understood that Eaton would forever not have to worry about the contaminated parcel coming in its ken again. While the City apparently agrees that it has no intention of actually cleaning up the contaminated parcel, it says it made clear that the limits of its "hold harmless" obligation was to assure Eaton that Eaton would never again have to worry about the contaminated property so far as anything the City did was concerned.

The parties disagree on whether Eaton was to have indemnification protection or contribution protection, however those terms may be defined.

Eaton submitted a draft of a definitive agreement to the City. The City says the draft is not consistent with what was agreed to on the record. The City apparently did not submit a counter-draft to Eaton.

Eaton has filed a motion to set the case against it down for trial on the grounds there was no definitive agreement reached on the record on March 7th, 1995. The City has responded with a Motion for Entry of Settlement Judgment, a part of which is a form of judgment which the City states is consistent with the record of March 7th, 1995.

This is one of the three oldest cases on the Court's docket. Resolution of the dispute between the City and Eaton does not conclude the case. There is still to be tried the City's claims against George Simon, et al., and Simon's third party claims against Eaton.

The statutes involved are complex. The distinction the parties draw on what was said on March 7th, 1995 involve arcane concepts of law and are based on a specialized glossary. The City may well be right that the protection for Eaton it agreed to was limited and that Eaton's concerns are at best speculative and conjectural.

On the other hand, Eaton agreed to pay $1,300,000.00 with, it says, the expectation it would have peace of mind and

get on with its corporate life. For the Court to sanction the City's view of the agreement reached on March 7th, 1995 would be inappropriate.

Assertions of environmental liability and the defenses have an element of gamesmanship. It sometimes seems that lawyers view such cases as fee generators, rather than efforts to properly allocate the expenses of cleaning up the environment.

For the reasons stated above, and for reasons of judicial economy and prudence, as well as the inability of the Court to determine precisely what the parties came to agreement on on March 7th, 1995 requires that this case go to trial.

Accordingly, Eaton's Motion to Set the Case Against it for Trial is granted, and the City's Motion for Entry of Settlement Judgment is denied.

Trial of the case will begin 9:00 o'clock August 14th, or immediately following the case currently on the Court's docket.

Insofar as the City's Motion for Summary Judgment against the Simons, it would be imprudent for the Court at this late date to give consideration to it, and for reasons of administrative convenience, the case against the Simons will be tried simultaneously.

The Motion for Summary Judgment by the Simons is denied. If the Simons have a claim against the City, it will have to be asserted at the trial. The City takes the position there is no such claim, because no complaint, or cross-complaint, or counter complaint, or however it's defined, has ever been filed against the City.

The Simon's Motion for Adjournment of Trial is also denied. A most expeditious, convenient, and prudent way disposing of this case from the Court's docket is to try all issues beginning, as the Court stated, August 14th at 9:00 a.m., or as soon thereafter as the Court's docket is clear for trial.

The Court will expect the parties to file the appropriate witness lists, exhibit lists, exhibit books, such stipulations of fact as are appropriate, and other matters to conveniently pursue -- to allow the case to conveniently go forward before the Court.

The Court appreciates the sincerity of the efforts made by all of the parties and is satisfied that given the level of competence of counsel, it will see them again next Tuesday morning, August 14th, at 9:00 a.m., or shortly thereafter, as soon as the Court is available.

The Court thanks each of you and wishes you all a good day.

MR. FINK,: Your Honor --

THE COURT: Yes, sir.

MR. FINK: May I, while we're still on the record, ask the Court if this matter, I realize the Court has responded to the Simon's motion, which was filed in anticipation of the Court's decision, which we have not responded to. I would reiterate and join in the Simon's request that this matter be briefly adjourned because the parties have been preparing for a very different trial than the trial that is now going to happen.

THE COURT: There will be no adjournment of the trial date as previously set under any circumstances. Thank you.

MR. FINK: Your Honor, while we're still on the record, I would also like to correct one thing on the record, if I may. The Court has stated that the City apparently did not submit a counter draft, and in fact, the record will reflect that it is even referenced in one of the Eaton briefs that the City did submit a counter draft.

The Court also referenced that the City had equivocated, and I would like the Court, if it is appropriate, to explain at what point the City equivocated in this case.

Finally, I would ask the Court if the Court would indicate on the record whether the Court is comfortable that it can, in fact, try this case without any bias with respect to the matters at issue, because the Court has repeatedly stated its

hostility to the claims and the form in which these claims have been filed.

THE COURT: The Court is satisfied that the Court can proceed with the trial beginning August 14th, 9:00 a.m., as previously indicated, and will be prepared to adjudicate the issues according to the law and the facts as the Court finds them. I don't think any further comment on the part of the Court is appropriate at this time.

Thank you.

MR. QUICK: Your Honor, if I just may on behalf of Eaton, I want to put on the record the fact that it will be almost impossible for Eaton to be ready to try the case on August the 14th.

THE COURT: Well, if it's not ready, it will be defaulted, Mr. Quick. That's perfectly clear. This Court, this is the second or third oldest case on the Court's docket. Everybody knows that the case was set for trial some weeks ago on August 14th, and I'm satisfied good lawyers can get ready in time and do it.

If, after we get into the trial, there's a need for a recess for further proofs, et cetera, the Court will always entertain it. This is a bench trial. You were prepared for trial once before, indeed you made opening statements. And if you'd like, I have the transcript of them from March 6th, and, I mean, you can use those if you want it, the transcript, you're more than welcome to it.

MR. FINK: May I approach the bench, your Honor?

THE COURT: Sure. So if you were ready once before, and I can't imagine why you can't be ready again.

It may be a bit of a struggle, I understand, Mr. Quick, and it may move slowly, but I think it will move steadily, and I'm satisfied that it can be properly tried. And the best way to conclude it is to try it.

Thank you.

MR. RUSSELL: Thank you, your Honor.

REPORTER'S CERTIFICATE

I, HERMAN H. TAPPERT, Official Court Reporter for the United States District Court for the Eastern District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing proceedings were had in the within entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

/s/ Herman H. Tappert
HERMAN H. TAPPERT
Official Court Reporter

Detroit, Michigan 48226

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CITY OF DETROIT, a Michigan municipal corporation,

Plaintiff,

v.

GEORGE SIMON, ET AL.,

Defendants.

Civil No. 91-75348

FILED
AUG 11 3[06] PM '95
CLERK
U.S. DISTRICT COURT
EAST. DIST. MICH.
DETROIT

ORDER

The motion styled PLAINTIFF'S EMERGENCY MOTION FOR CERTIFICATION FOR INTERLOCUTORY APPEAL is DENIED.

The Court is satisfied that the question of whether the parties came to a complete agreement on the terms of the settlement of the City of Detroit's case against Eaton Corporation is one of fact. Clearly the parties contemplated a definitive agreement before their litigation was to be concluded. Absent a definitive agreement there was no settlement. A concession of liability is not an agreement as to the appropriate remedy.

This is the third oldest case on the Court's docket. Because the claims of the City of Detroit against George Simon, *et al.* and the cross-claims of George Simon, *et al.* against Eaton Corporation are still to be tried, settlement of the dispute between the City of Detroit and Eaton Corporation will not end this case. The most expedient and economical

way to conclude this case is to try the various claims among the parties. Allowing an interlocutory appeal at this time will only prolong the litigation.

SO ORDERED.

/s/ Avern Cohn
AVERN COHN
UNITED STATES DISTRICT JUDGE

DATED: AUG 11 1995
DETROIT, MICHIGAN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CITY OF DETROIT,

Plaintiff,

v.

No. 91-75348

EATON CORPORATION,
and
GEORGE SIMON, JOSEPH SIMON,
SHIRLEY SIMON, NORMA SIMON,
U.S. EQUIPMENT CO., and
U.S. GROUP, INC.,

Defendants.

_____/

DECISION[1]

[1]This is an edited version of the Court's bench decisions of May 7, 1998 and September 28, 1998.

C20

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I. Introduction

This is an unexceptional environmental cleanup case filed October 15th, 1991. It has been overlawyered by plaintiff City of Detroit (City) and stubbornly defended by defendant Eaton Corporation (Eaton), the principal culprit in the contamination activities at issue. Defendants George Simon, Joseph Simon, Norina Simon, Maurice Taylor and Madeline Taylor, U.S. Group, Inc., and U.S. Equipment Company (the Simons), also responsible for some of the contamination, have more or less stood by while the City and Eaton unnecessarily exaggerated the proceedings (see the 237 docket entries thus far) by hypothetical assertions hardly worthy of a municipality looking to attract industry and a major American corporation.

The parcel in question is a 15-acre site at 9733 Grinnell Avenue on the east side of Detroit formerly occupied by a large factory and associated structures. Because the parcel has only been partially leveled with the factory floor still in place, the scope of the work and expenses to be incurred to remove the contaminants to make the parcel useful for either industrial or commercial use is unknown. Indeed, it is questionable whether the parcel will ever be cleaned up since the City acquired the parcel to clear the approaches to the Detroit City Airport. See 14 C.F.R. 151.9, establishing standards for runway clear zones.

The City seeks a judgment for monies already spent on securing the parcel and investigating the extent and likely sources of contamination. The City also seeks a declaration of who is responsible for future expenses necessary to clean up the parcel if and when it is cleaned up. Eaton and the Simons, while admitting some responsibility for the contamination, point fingers at each other and, rather than joint and several liability, would like the Court to apportion liability with the City included in the apportionment.

A more detailed background of the case is reflected in the Memorandum and Order of July 10, 1992, stripping the case of some of the excesses in the City's complaint, and the Memorandum of September 28, 1994, imposing liability on the Simon defendants for the $126,190 spent by the City in cleaning up contaminants caused by an improper release of PCB'S.

A partial final judgment of $156,619.91 was entered against the Simons on the PCB cleanup on April 17, 1995, nunc pro tunc to December 5th, 1994. What the Court said in the memorandum of September 28, 1994, bears repeating:

> The Court recognizes the brevity of this Memorandum in light of the length of time this case has been pending, the extended record, and the customarily complicated opinions CERCLA cases usually generate. Given the straightforward progression of the steps the City followed from the time it acquired the property and defendants' involvement with the contamination, the acquisition and what followed, a longer and more detailed memorandum is not necessary. Likewise, there is no need for a discussion of the precedents in this area of the law.

Memorandum dated September 28, 1994 at 4 (footnote omitted).

So to here, notwithstanding the 1 0 days of trial, the 13 witnesses who testified in person or by deposition, and the 87 exhibits, there is no mystery about the law in this area. Two statutes are involved. The Environmental Response Contamination and Liability Act Of 1980 (CERCLA) 42 U.S.C. § 9601 *et seq.;* and Michigan's Natural Resources and Environmental Protection Act (NREPA) M.C.L. § 324. 101, *et seq.* While the configuration of NREPA changed during the course of the case, the changes do not significantly affect defendants' liability.

The differences between CERCLA and NREPA are not significant. *See Kelly ex. rel. State of Mich. v. Kysor. Indus. Corp.*, 826 F.Supp 1089, 1094 (W.D. Mich. 1993). Contrary to Eaton's assertions, both statutes allow for a declaratory judgment. As will be discussed, the petroleum exclusion in CERCLA does not help Eaton and, even if it does, NREPA fills the void. The cases and law review articles in this area of the law are legion and will be referred to only as necessarily related to the particulars of the case. Essentially the City must prove that, in statutory jargon:

A. A defendant was an owner and/or operator of the parcel;

B. A release of a hazardous substance occurred on the parcel prior to or at a time that it was owned or operated by a defendant;

C. The parcel was a facility; and

D. The City incurred response activity costs resulting from the release of hazardous substances.

What is difficult about this case are the unknowns even at this late date in its history. The City acquired the parcel in 1988 to remove a flight path obstruction. When it acquired the parcel, it knew of the contamination and reserved the right to pursue reimbursement for the expenses of cleanup when it paid the Simons, the then owners.

After the City took possession of the parcel in 1993, it demolished the factory building and associated structures on it, cleaned up the PCB'S, and through consultants made a detailed study of the contamination. These studies do not tell the full story since a portion of the parcel is still covered by a concrete factory floor.

The Simons' were obviously aware of the potential for liability. Eaton was also aware of the potential for liability. Eaton, with some difficulty occasioned by its inability to agree with the City on the conditions for access to the parcel, did its own assessment of the contamination. Why the City and

Eaton have been unable to resolve their differences is unknown when settlement is obviously the preferred method of resolving this kind of case. The Simons appear to have been ready at all times to get the case behind them.

What follows are the findings of fact and conclusions of law required by the Federal Rules of Civil Procedure. As will be discussed, the Court will not stop with a determination of joint and several liability. After all of the effort that has gone into this case, the Court will apportion liability between the City, Eaton and the Simons.[1]

At best, the apportionment, while percentage-wise definitive, is an educated guess. There is simply no way at this time, even with all of the investigative effort that the parties have expended, to determine with scientific accuracy the extent of the parcel's contamination and what exactly must be done to put it in usable condition. This is not a case involving an oil spill.

Likewise, there is no way the Court can divide responsibility with mathematical certainty for the expenses already incurred in securing the parcel and investigating the causes and scope of contamination. What is certain is that the parcel is contaminated and, by and large, that the contamination was caused first by Eaton's manufacturing operations for the 48 years it owned the parcel from 1924 to 1972 and then by the Simons' storage operations for the 20 years it owned and occupied or leased the parcel from 1972 to 1992.

II. The Parcel

The parcel consists of 15 acres at the northwest corner of French Road and Grinnell Avenue immediately south of

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[1]A copy of the Judgment entered December 10, 1998 is attached as Exhibit 3.

Detroit City Airport. About half of the parcel was formerly occupied by a factory building and associated structures. The unoccupied areas were used principally for parking and outside storage. It had rail access through a track on the north side. Much of the in-and-out activity was by truck.

Exhibit 1 to this Decision is an aerial photograph of the parcel as developed. Exhibit 2 displays the parcel as developed as well as areas of heavy concentration of contaminants from Eaton's quench oil operations. Not shown is the piping system which interconnected the parts of the quench oil operation. Additional drawings in the record display the specific characteristics of the soil at monitoring wells and soil boring and soil sample locations described in the reports of the various experts.

The contaminants present at these various locations in various combinations and concentrations include, arsenic, barium, cadmium, chromium, copper, lead, mercury, selenium, zinc, acenaphthene, ethylbenzene, naphthalene, fluoranthene -- toluene and xylene. The expert testimony at trial attempted to correlate these metals and volatiles to the various contaminating solids and liquids present in the operations of Eaton and the Simons such as quench oil, fuel oil, gasoline, water soluble oils sprayed on parts to prevent corrosion, hydraulic oils, steel scale residues, transformer oils, cleaning solvents, metal chips, and sludge. There was no credible testimony which fairly located each of the various contaminating solids and liquids to particular areas of the parcel as is frequently done in the oil spill cases.

The surficial soil is a fill consisting of sandy soils and rubble with underlying clay. There is no downward migration of water so that none of the contaminants have a migratory potential. The groundwater flow patterns do not present a danger. The contaminants consist of petroleum compounds and heavy metals. None of the volatile organic component contaminants which are normally found in gasoline and oil are found freestanding with one possible exception.

Contaminants associated with metals and contaminants associated with oil and gasoline are almost always found in combination.

The specific areas which constitute source areas of contamination beyond the perimeter of the concrete slab of the factory floor are: the scale dump area in the northwest corner; two above-ground quench oil storage tanks in the northwest area; the propane tank cradle area in the western part; the pump house area along the northern boundary; an underground gasoline tank in the west area; an underground gasoline tank in the east area; and an area along the north boundary formerly occupied by a 20,000-gallon fuel oil storage tank.

III. Eaton

A.

Eaton acquired the parcel with the factory buildings already in place in 1924. Over the years of its ownership and occupancy, Eaton manufactured mechanical springs and other metal parts for the automobile industry, including suspension coil springs and leaf springs.

The manufacturing operations included heat-treating to strengthen the springs. In heat-treating, the springs were run through a high-temperature furnace and then cooled in a petroleum bath liquid known as quench oil. Quench oil is a low-grade petroleum product with rather specific characteristics.

The quench oil system consisted of three hot baths-, underground storage tanks, a cooling bath, above-ground storage tanks, and a pump house, all interconnected by a system of pipes. The quench oil flowed between and among tanks and baths under pressure from pumps in the pump house. Approximately 40 to 50 thousand gallons of quench oil was in the system at any one time. The quench oil was replenished from time to time to replace quench oil lost from

the hot baths catching fire and from sludge dropping from the bottom of the hot baths, cooling baths, and tanks, when metal particles chipped off the springs in the manufacturing process and as they moved along the production line. On occasion, the hot and cold baths were closed down and the sludge removed to a dry area in the northwest corner of the parcel.

Eaton was not a good housekeeper. It's care of the quench oil system extended only to insure its operability. In the 1960's there was a pipe break in the system from which about 6,000 gallons of quench oil leaked into the soil beneath the factory floor. While the break in the pipes was repaired, little of the 6,000 gallons was recaptured. When Eaton vacated the parcel, it drained the system. It did not remove any of the tanks.

Eaton's manufacturing operations also involved: a 200,000-gallon fuel oil tank which it removed in the 1950's; water soluble oils sprayed on parts to prevent corrosion; gasoline, including two underground storage tanks at the east and west of the factory building; hydraulic oil in machines which was usually stored in reservoirs in the machines; and the steel from which the springs were manufactured. In the 48 years of Eaton's operations it also stored reserves of the various oils in 55-gallon drums, and the steel used in manufacturing springs.

B.

Eaton's principal effort at trial was to correlate the specific chemical characteristics of quench oil to the specific chemical characteristics of the samples obtained from the soil borings and monitoring wells to establish that the contaminants present in the samples were not characteristics of quench oil. This of course did not account for the contaminant characteristics of steel, nor did it have any relevance to what is likely still underneath the concrete slab as a residue of the quench oil spill and the leakage and general deterioration of the quench oil system.

C.

The Court is satisfied that the principal sources of contamination of the parcel are proximately related to Eaton's manufacturing operations. Eaton was the longest occupant, and its manufacturing operations reflect the most intense use of the parcel. As previously noted, environmental concerns were not an Eaton priority. Indeed, there was no testimony that suggested they were even an agenda item for Eaton.

IV. Simons

The Simons bought the parcel in 1973. For the years 1976 to 1985 the parcel was leased to General Motors Corporation which used it, interior and exterior, for the storage of raw steel, dyes, and fabricated steel products. Traffic in and out was by truck. From 1985 to 1993, the Simons used the parcel for inside storage of industrial machines. Again, traffic in and out was by truck. During the years the Simons owned and occupied the parcel, the quench oil system of tanks and baths and pipes remained in place and likely further deteriorated.

During these years there was some rail traffic and extensive automotive, truck and forklift truck traffic. Gasoline was used and stored on the parcel. The machines on on the parcel contained hydraulic oil. The machine parts and dyes were sprayed to prevent corrosion. Cleaning solvents were used. Metal parts and the machines chipped. The roof leaked. The concrete floors were cracked. While General Motors was a good housekeeper, it and the Simons, like Eaton, did not give much attention to environmental matters.

The Simons' use was considerably less intense than Eaton's but not insignificant. To what extent cracks in the factory floor allowed for oil spillages to seep through to the soil below is unknown. Some of the soil, soil boring and monitoring well boring samples display chemical characteristics related to metal solids and the liquids present

in the Simons' operation. This of course means that some of the yard area contaminants are attributable to the Simons. However, the initial cleanup by the City likely removed any concrete floor contaminants traceable to the Simons.

V. The City

Upon acquiring the parcel, the City demolished the factory structures and cleaned up free oil present in the northeast corner of the parcel in the area of the above-ground storage tanks and steel scale storage pits. The City removed and disposed of the two above-ground quench oil storage tanks and abated the flow of free oil in their area. The City also cleaned up the PCB contamination attributable to the Simons.

Additionally, the City secured the parcel and did an extensive environmental study through soil, soil borings and monitoring well sampling. The samples obtained were subject to gas chromatograph scans and known to unknown "fingerprints" comparisons.

The City's environmental studies found significant oil contamination beneath the concrete floor. A current physical examination of the parcel suggests that the City has not been an exemplary housekeeper in its demolition and cleanup, and that it did not conduct its demolition and cleanup with as much care as was reasonably possible.

VI. The Petroleum Exclusion

Eaton's reliance on the petroleum exclusion in CERCLA, 42 U.S.C. § 9601(14), *i.e.* the definition of "hazardous substance" expressly excludes "petroleum, including crude oil or any fraction thereof not specifically listed or designated as a hazardous substance," is misplaced for two reasons. First, there is no such exclusion under NREPA and, as will be discussed, NREPA does not preclude

a declaratory judgment as to future liability. More importantly, there is a clear distinction in the precedents between "reusable" petroleum, which is excluded, and "waste" petroleum, which is not excluded, and which characterizes the petroleum product involved in Eaton's operations.

Here, the petroleum product involved in Eaton's operation was quench oil, a very low grade of petroleum used as a cooling bath for metal parts hardened in a heat-treating furnace. The quench oil, as described above, was confined to a closed loop running in and out of a number of open and closed tanks through which various forms of metal springs were passed. As the quench oil was recycled through the system, it became contaminated by minute particles of metal or scale so that from time to time open tanks had to be taken out of the system and the sludge formed by a combination of quench oil and metal scale removed. The amount of quench oil in the system remained constant, to be replenished from time to time by the loss occasioned by the formation of sludge and by quench oil which caught fire and burned off. Clearly, the quench oil which escaped the system through leakage or otherwise was a waste product and not reusable.

Under these circumstances the petroleum exclusion simply does not apply. The quench oil fragments and samples tested showed the presence of hazardous substances that clearly fall within the NREPA and CERCLA proscriptions and are likely the result of heavy metal scrapings, etc. In *Mid Valley Bank v. North Valley Bank*, 764 F.Supp 1377, 1384 (E.D. Cal. 1991), adulterated waste oil coming from corrosion or leaking of underground tanks was found to fall outside the exclusion. The facilities in question had been used to store gasoline, diesel and waste oil. Lead, zinc and thallium were among the substances released. Id. at 1382. In *United States v. Western Processing Co., Inc.*, 761 F.Supp 713, 721 (W.D. Wash. 1991), tank bottom sludge containing a rust-like scale of corrosion products from the oxidation of steel in tank walls was held not to be "petroleum." The "contaminants" in

question were substances not normally found in petroleum. *See also, State of Wash. v. Time Oil Co.*, 687 F. Supp. 529, 532 (W.D. Wash. 1988) (exclusion does not apply where contaminants are found in petroleum in excess of those normally occurring in oil refining process).

In contrast, in *Wilshire Westwood Associates v. Atlantic Richfield Corp.*, 881 F.2d 801 (9th Cir. 1989), the petroleum exclusion was held to apply to leaded gasoline because the lead present, although a hazardous substance, was indigenous to gasoline as refined. As explained in *Niecko v. Emro Marketing Co.*, 769 F.Supp 973, 981 (E.D. Mich. 1991):

> [The] "petroleum exclusion" has been universally interpreted by both the Environmental Protection Agency and the courts to remove from the coverage of CERCLA those otherwise hazardous substances which are inherent in petroleum, but not hazardous substances that are added to, or mixed with, a petroleum product during or after use.

In *Nieko* the contaminants found were benzene, toluene, ethyl benzene and xylene. These are indigenous components of gasoline. 769 F. Supp. at 982.

Here the volatiles found were associated with contaminants related to heavy metals. As stated by the Simons:

> Here Eaton's quenching system circulated oil throughout the facility via piping and holding tanks. The oil admittedly left behind by Eaton is no longer "product" like because it has been contaminated by the process, discharged to the ground, and has otherwise legally become a waste.

Simons Defendants' Revised Post Trial Brief, p. 6.

VII. Relief

A. Introduction

A complete cleanup of the parcel is still in the future. What Detroit now seeks is a declaratory judgment determining liability for the expenses that it will incur at some later date when it decides to put the parcel to some presently unknown use. Both NREPA and CERCLA provide for such judicial decision making at this juncture of the cleanup of a contaminated parcel. To hold otherwise would require a lawsuit following each phase of a total cleanup. The text of NREPA is silent on the point, and there is nothing in Michigan's declaratory judgment law jurisprudence to deny the Court such authority. CERCLA is explicit on the point, 42 U.S.C. 9613(g)(2). As noted in *Kelley v. E. I. DuPont De Nemours and Co.*, 17 F.3d 836, 845 (6th Cir. 1994):

> Given that the probability of subsequent activity in such instances is more likely than remote, it would waste State, corporate and judicial resources, and add immensely to already 'elephantine carcass of ... CERCLA litigation' to require relitigation of liability whenever such subsequent response action is taken.

B. Apportionment of Liability

Detroit takes the position that the liability of Eaton and the Simons is joint and several because the harm they caused is indivisible since it is impossible to determine relative contribution in a meaningful way. *Kelley v. Thomas Solvent Co.*, 727 F. Supp. 1532, 1552 (W.D. Mich. 1989). To avoid joint and several liability, Eaton and the Simons must prove that the harm they caused is divisible. *United States v. Chem-Dyne Corp.*, 572 F.Supp 802, 811 (1983).

Here we have both the same and different contaminants from the activities of Eaton and the Simons.

Quench oil contamination is clearly from Eaton's activities. Other oils, hydraulic and coating as well as other contaminants, come both from Eaton's activities and the Simons' activities. Measured by length of time and intensity of use, Eaton caused significantly more of the harm than did the Simons. Also, in some modest way, the City through carelessness in its investigation and cleanup activities, as well as the manner in which it secured the parcel, could have contributed to the harm.

It would be a disservice to the parties as well as a waste of judicial resources if the Court did not make an attempt at apportionment instead of leaving to another day apportionment of liability for the expenses of future cleanup activities. Fortunately the law, statutory and case, provides the opportunity for such an effort in the manner in which it provides for determination of contributions among liable parties. As to NREPA, see M. C. L. § 324.20129(3), and as to CERCLA, see 42 U.S.C. § 9613(f)(1). Under both statutes the Court is given wide latitude in applying appropriate equitable factors. NREPA explicitly lists the following factors:

A. Each person's relative degree of responsibility in causing the release or threat of release.

B. The principles of equity pertaining to contribution.

C. The degree of involvement of and care exercised by the person with regard to the hazardous substance.

D. The degree of cooperation by the person with federal, state, or local officials to prevent, minimize, respond to, or remedy the release or threat of release.

E. Whether equity requires that the liability of some of the persons would constitute a single share.

M.C.L. 324.20129(3).

The substance of these factors was first discussed during the course of legislative amendments to CERCLA in 1986, H.R. Rep. No. 99-253 (III) (1985), reprinted in 1986 U.S.C.C.A.N. 2835, 3038, 3042, and discussed in *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664 (5th Cir. 1989), as clarified on denial of rehearing (5th Cir. 1990).

When the harm is divisible, damages may be apportioned. *O'Neil v. Picillo*, 883 F.2d 176, 178-79 (1st Cir. 1989). This principle was recognized in *In the Matter of Bell Petroleum Services*, 3 F.3d 889 (5th Cir. 1993), where the court noted that while joint and several liability is commonly imposed, it is not mandatory if it can be apportioned. Id. at 895-96, *citing* Restatement (Second) of Torts § 443. The Court said that if there is a reasonable and just method for determining the amount of harm caused by each party it should be followed. Id. The assumptions to be used must be well founded and reasonable.

Also to be noted is the principle that the current land owner may sometimes bear some responsibility for past activity. *See The South Florida Water Management District v. Juan Montavloe*, 1989 W.L. 260215 (S.D. Fla. 1989).

During the trial the Court was of the view that Eaton should bear the lion's share, Tr. 9/7/95 at 1440-1441, in the ratio of 95 to 5. On reflection, the Court is of the view that a more sophisticated analysis is appropriate taking into consideration the gross areas of contamination, the impact of Eaton's quench oil operation, and the length of time Eaton and the Simons each occupied the parcel. The analysis which follows endeavors to do that and to take into consideration the fact that Eaton was environmentally careless during its occupancy and that the Simons were also environmentally careless during their 20 years of ownership and occupancy, and that hydraulic and coating oils were an important part of the Simons' activities.

The parcel is 15 acres in size or approximately 645,000 square feet. About half of the parcel is contaminated or 322,500 square feet. Considering Eaton's operations, it should be exclusively responsible for one-third of the contaminated area or for 107,500 square feet. Likewise, the cradle area of 1 0,000 square feet should be Simons' responsibility alone. For the balance of the area, or 205,000 square feet, Eaton and the Simons should share responsibility equally less 5 percent attributed to the City.

While this allocation may appear arbitrary, it is the Court's best judgment as to a proper apportionment of the expenses to be incurred in the past and in the future. Applying this formula yields the following:

A. Total area to be cleaned up: 322,500 square feet.

B. Eaton's exclusive responsibility: 107,500 square feet.

C. The Simons' exclusive responsibility: 1 0,000 square feet.

D. Eaton, the Simons and Detroit's responsibility: 205,000 square feet.

The percentage apportionment of responsibility is as follows:

1. Eaton, 33%
2. The Simons, 3%.
3. Joint, 58.7%
4. City, 5%.

The apportionment between Eaton and the Simons based on years of ownership is as follows:

1. Eaton occupied the parcel from 1925 to 1973 or 48 years.
2. Simons occupied the parcel from 1973 to 1993 or 20 years.

Multiplying this apportionment by the percentage of joint liability, and adding the resulting figure to the individual liability figure, results in the following apportionment

reflected in the Judgment: Eaton, 74.94%; Simon, 20.06%; Detroit, 5%.

C. City's Expenses To Date

The parties agree that the City has spent thus far $247,402 relating to cleanup of the parcel, including $137,757 that was paid for an environmental assessment. The remainder was spent for cleanup and removal of underground storage tanks, acutely contaminated soils and water, fencing, soil samplings, and investigation and inspection and reporting. These expenses are, in statutory parlance, Response Costs and Response Activity Costs, and the City is entitled to payment for them at this time. The costs which are reflected in the totality of the expenses include studies, sampling and analyzing of soil and ground water conditions. These costs are recoverable under NREPA as a cost of evaluation, Mich. Comp. Laws 324.20101(l) and under CERCLA as a cost of removal, 42 U.S.C. 9601(23).

Further, the City was not required to conform its actions with the National Contingency Plan's (NCP) comment/participation requirements. Cleanup is not yet at its final stages. See *Donahey v. Bogle*, 987 F.2d 1250, 1255-56 (6 th Cir. 1993), *vacated and remanded on other grounds*, 512 U.S. 1201 (1994), *reinstated and reaffirmed in relevant part*, 129 F.3d 838 (6th Cir. 1997).

In any event, NREPA does not require compliance with NCP. The $247,402 amount simply relates to the expense of actions immediately necessary to secure the parcel and in advance of determination of the actions necessary for a complete cleanup. *Pierson Sand & Gravel. Inc. v. Pierson Township*, 89 F.3d 835 (6 th Cir. 1996), is not to the contrary. In that case an effort was made to obtain remedial costs without complying with the NCP, and the plaintiff did not separately claim for remedial investigative costs. Likewise, in *Sherwin Williams Co. v. City of Hamtramck*, 840 F. Supp. 470 (E.D. Mich. 1993), the City of Hamtramck failed to comply

with the NCP. There the Court distinguished between a removal action which does not require compliance with NCP and a remedial action which does. Id. at 475.

VIII. Conclusion

This has been an inordinately long and contentious case. CERCLA and NREPA are not so obtuse as to need an academic mind to fathom and so ambiguous as to dissuade a good lawyer from advising a client as to the potential for liability. Notwithstanding the uncertainty as to the extent and nature of the cleanup necessary to make the parcel usable, the history of use by Eaton and the Simons was fairly straightforward and their lack of concern for environmental damage from the way they used the parcel is clear-cut.

The City was perhaps a bit foolish in buying the parcel without an agreement with the Simons about cleanup. However, since the Federal Aviation Administration insisted on removal of an obstacle in the flight path to City Airport (really only a small corner of the factory building in the northeast corner about ten feet too high) and was willing to reimburse the City for the cost of acquisition, it was perhaps understandable for the City to proceed as it did.

Filing suit in 1991 was a likely worthwhile precaution. It put Eaton and the Simons on notice. Proceeding with vigor to obtain at best a declaratory judgment of uncertain content because of the vagueness of future use and the indetermination of the scope of contamination is difficult to understand. Certainly the City was entitled to be paid for the expenses of cleaning up the PCB'S. The investigation of the parcel's contamination should have been a joint effort with agreement as to sharing of costs for the investigation. Instead, Eaton and the City went at each other like gladiators in the Roman Forum with no expense spared and no holds barred. The Court, as much as it tried, was unable to contain the

excesses. All of the worst that is displayed in complex litigation was on stage here.

/s/ Avern Cohn
AVERN COHN
United States District Judge

DATED: JAN 1 9 1999
Detroit, Michigan

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CLOSED DEC 10 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CITY OF DETROIT,

Plaintiff,

v. No. 91-75348

EATON CORPORATION,

and

GEORGE SIMON, JOSEPH SIMON, SHIRLEY SIMON, NORINA SIMON, U.S. EQUIPMENT CO., and U.S. GROUP, INC.,

Defendants.

JUDGMENT

This action came to trial before the Court. The issues have been heard and a decision rendered on May 7, 1998 and supplemented on September 28, 1998.

IT IS ORDERED AND ADJUDGED

I.

A. 1. Eaton Corporation (Eaton) and George Simon, Joseph Simon, Norina Simon, Shirley Simon, U.S. Group, Inc. and U.S. Equipment Co. (Simons) are liable to the City of Detroit (City) for Response Activity Costs under Mich. Comp. Laws §§ 324.20126 and 324.20129 (NREPA) and for Response Costs under 42 U.S.C. §§ 9607 AND 9613 (CERCLA) in the amount of $247,402 in connection with hazardous substance

contamination at the property commonly known as 9773-10227 Grinnell Avenue, Detroit, Michigan (property).

2. Eaton's allocable share is 74.94%. Simons' allocable share, jointly and severally is 20.06%.

3. The City of Detroit's (City) allocable share is 5%.

B. Eaton and Simon are liable for interest on their allocable shares as of October 31, 1998 in the amount of $154,807.

C. 1. As of October 31, 1998 Eaton's total liability is $301,415.

2. As of October 3, 1998 Simons' total liability is $80,683.

3. Interest shall accrue on the foregoing amounts at the rate set forth in Mich. Comp. Laws § 324.20126a(3) from November 1, 1998 to date of payment.

II.

A. Eaton and Simons are liable for future recoverable Response Activity Costs and Response Costs to be incurred by the City in connection with hazardous substance contamination at the property as determined by the Court in its findings of May 7, 1998 and September 28, 1998 to the extent that such recoverable Response Activity Costs are incurred in a manner consistent with Mich. Comp. Laws § 324.20126 and/or such recoverable Response Costs are incurred in a manner consistent with 42 U.S.C. § 9607.

B. Eaton and Simons shall not be liable for future Response Activity Costs or Response Costs

1. Not confined or related to, migrating from, and or commingled with

the contamination on the property within the area designated on Exhibit A.

2. Incurred to achieve a clean up level in excess of the industrial clean up category in Mich. Comp. Laws § 324.20120a(1)(d).

C. Eaton's allocable share of future liability is 74.94%. Simons' allocable share of future liability is 20.06%.

III.

A. The Amended Judgment in the amount of $158,619.91 entered December 5, 1994, nunc pro tunc April 17, 1995, a copy of which is attached as Exhibit B, and this Judgment, together constitute the final judgment in this case.

B. 1. The Amended Judgment has accrued interest as of October 31, 1998 in the amount of $77,599.

2. Interest shall continue to accrue on the Amended Judgment at the rate set forth in Mich. Comp. Laws § 324.20126a(3) from November 1, 1998 to date of payment.

AVERN COHN
United States District Judge

DATED: DEC 10 1998
Detroit, Michigan

Ruben Acosta
Bob David
Jim Russell
Harry Quick
12/10 1998

0713

EXHIBIT "A"
0714

AO 450 (Rev. 5/85) Judgment in a Civil Case

United States District Court

EASTERN DISTRICT OF MICHIGAN

CITY OF DETROIT,

Plaintiff,

V.

GEORGE SIMON, et al,

Defendants.

AMENDED

JUDGMENT IN A CIVIL CASE

CASE NUMBER: 91-75348

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial and hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the City of Detroit recover from defendants George Simon, Joseph Simon, Shirley Simon, Norina Simon, U. S. Equipment Co., and U. S. Group, Inc., jointly and severally, as follows:

1. $126,170 for past response costs and response activity costs in connection with the PCB contamination
2. $20,074.91 for prejudgment interest
3. $10,375 for attorney fees

for a TOTAL amount of $156,619.91.

FILED
MAR 17 1995
U.S. DISTRICT COURT
EASTERN DIST. OF

December 5, 1994(nunc pro tunc)
Date April 17, 1995

JOHN P. MAYER
Clerk

(By) Deputy Clerk JUDY CASSADY

EXHIBIT "B"

0715

11.C

No. 01-459

(3)

IN THE

Supreme Court of the United States

EATON CORPORATION,

Petitioner

v.

CITY OF DETROIT,

Respondent

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For the Sixth Circuit

REPLY BRIEF OF PETITIONER

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5 pp

CORPORATE DISCLOSURE

Pursuant to Sup. Ct. R. 29.6, Petitioner Eaton Corporation incorporates by reference the corporate disclosure statement made in its Petition for Writ of Certiorari.

REPLY BRIEF OF PETITIONER

Eaton Corporation's Petition presented the question of whether the Sixth Circuit correctly applied the "clearly erroneous standard" of Fed. R. Civ. P. 52(a) in holding - contrary to the District Court in whose presence settlement talks occurred - that the parties entered into a settlement agreement on the record. Respondent's Opposition Brief denies that the "clearly erroneous" standard applies to appellate review of a district court's pre-trial findings. If Respondent is correct that the Sixth Circuit did not apply the "clearly erroneous" standard, then review is warranted to correct this error and clarify the proper standard.

As Eaton noted in its Petition, the Sixth Circuit's opinion does not identify the standard of review that it applied below. Pet. 4-5. Eaton believes, based on the fact that the Sixth Circuit twice referred to the District Court's decision as "clearly erroneous," that the Sixth Circuit was purporting to apply Rule 52(a) in reversing the District Court's finding that no settlement occurred. *Id.* Eaton's Petition argues, however, that in fact the Sixth Circuit substituted its own interpretation of the facts for that of the District Court, contrary to *Anderson v. City of Bessemer*, 470 U.S. 564 (1985).

Respondent's Brief denies that the Sixth Circuit applied or was obliged to apply the "clearly erroneous" standard. Opp. 10-11. According to Respondent, the "clearly erroneous" standard applies only "to findings of fact made by a district court after a non-jury trial but before entry of judgment." Opp. 11. Because the District Court found *before* trial that no settlement was reached (Pet. 2-3, Supp. App. C10-11 and C17-18), Respondent asserts that the Sixth Circuit was free to apply a *de novo* standard of review.

Eaton argued below that a court of appeals must apply the "clearly erroneous" or "abuse of discretion" standard in reviewing a district court's findings as to settlement validity and enforceability. (Eaton's Final Brief on Appeal at 14-19.) This is the standard applied, for example, in *Therma-Scan, Inc. v. Thermoscan, Inc.*, 217 F.3d 414, 419 (6th Cir. 2000) (applying "clearly erroneous" standard and reversing trial court's finding that parties entered into binding settlement agreement in open court). *See also Wilson v. Wilson*, 46 F.3d 660, 664 (7th Cir. 1995) (collecting cases applying "clearly erroneous" or "abuse of discretion" standard in reviewing settlement determinations).

Respondent argued below that the *de novo* standard applied instead. (City of Detroit's Final Brief on Appeal at 21.) Respondent inaccurately characterized the issue as one of contract interpretation, not contract formation. (*Id.*) In this Court, Respondent's Brief in Opposition cites no authority other than the text of Rule 52(a) for the proposition that a pretrial finding concerning settlement is subject to *de novo* review. Opp. 10-12.

The parties agree, then, that the Sixth Circuit did not faithfully apply the "clearly erroneous" standard in reviewing the trial court's determination that no meeting of the minds occurred during pretrial settlement discussions. Where the parties differ is that Eaton argues that the Sixth Circuit purported, but failed, to apply this standard; the City of Detroit argues that the standard did not apply. This crucial difference is further reason for this Court to grant certiorari to clarify the respective roles of the District Court and the Courts of Appeals in deciding issues of fact.

For all the reasons set forth above and in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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November 16, 2001